Supreme Court, U.S.
FILED

No. 98-___

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In The

Supreme Court of the United States

GLORIA ROBINSON, as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement for the Landmark Group and as a participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, *et al.*,

v. *Petitioners,*

CLOCK TOWER PLACE INVESTMENTS, LIMITED, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Fourth Circuit erred in failing to consider the legal significance of the fact petitioners, as known creditors of the bankruptcy estate, were not given the statutorily and/or constitutionally requisite notice of the bankruptcy proceedings.

The Fourth Circuit erred in giving legal significance to the fact that one or more of the petitioners may have had constructive knowledge of the bankruptcy proceedings.

The Fourth Circuit erred in adopting and applying a rule that where a creditor has constructive knowledge of bankruptcy proceedings, the debtor is excused from any obligation to cause actual notice to issue, which is contrary to the law announced by this Honorable Court and applied by other United States Courts of Appeal.

The Fourth Circuit erred in adopting and applying a rule that even if a known creditor has only constructive knowledge of bankruptcy proceedings, the creditor's due process rights are satisfied and the creditor's late claim will be barred, which is contrary to the law announced by this Honorable Court and applied by other United States Courts of Appeal.

LIST OF PARTIES, PARENT COMPANIES AND SUBSIDIARIES

Debtors:

In Re: Clock Tower Place Investments, Limited, a California corporation; Landmark Land Company of Carolina, Incorporated, a Delaware corporation; Landmark Land Company of Oklahoma, Incorporated, an Oklahoma corporation; Landmark Land Company of Florida, Incorporated, a Delaware corporation; Landmark Land Company of Louisiana, Incorporated, a Louisiana corporation; Landmark Land Company of California, Incorporated, a Delaware corporation.

Petitioners:

Gloria Robinson, as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement for the Landmark Group and as a participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group; Michael Welch, Trustee of the 501(c)(9) Trust Agreement for the Landmark Group and as a participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group; V. Jackson Carney, as Trustee for the Landmark Group and as a participant of the Landmark Group Insurance Program 501(c)(9) Trust Agreement for the Landmark Group and as persons entitled to receive benefits under the landmark 501(c)(9) Trust.

LIST OF PARTIES, PARENT COMPANIES AND SUBSIDIARIES – Continued

Respondents:

Clock Tower Place Investments, Limited; Resolution Trust Corporation, as Conservator for Oak Tree Federal Savings Bank in Receivership and its successor the Federal Deposit Insurance Corporation; Landmark Land Company of Florida, Incorporated; Landmark Land Company of Oklahoma, Incorporated; Landmark Land Company of Carolina, Incorporated; Landmark Land Company of Louisiana, Incorporated; Landmark Land Company of California, Incorporated; Northern California Ranch, Incorporated, formerly known as Carmel Valley Ranch.

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LIST OF OPINIONS AND ORDERS

The relevant opinions and orders are included in the appendix and are:

Unpublished opinion of the United States Court of Appeals for the Fourth Circuit, #98-2061, filed March 29, 1999.

Unpublished order of United States District Court for the District of South Carolina, Charleston Division, CA#2:91-3287-1, Bk#91-05814; CA#2:91-3286-1, Bk#91-05815; CA#2:91-3291-1, Bk#91-05816; CA#2:91-3290-1, Bk#91-05817; CA#2:91-3289-1, Bk#91-05819; CA#2:91-3288-1, Bk#91-05818, filed June 19, 1998.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS HONORABLE COURT

The date the judgment sought to be reviewed was entered is March 29, 1999.

Rehearing was sought, but denied, and petitioners are not relying on the date of the denial of rehearing, but rather file this petition timely with reference to the date of the judgment sought to be reviewed.

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. § 1254(1).

THE PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the 5th Amendment to the Constitution of the United States: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

11 U.S.C. § 102(1): "[A]fter notice and hearing . . . means after such notice as is appropriate in the particular circumstances . . . "

11 U.S.C.A. § 342:

(a) There shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.

(b) Prior to the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give written notice to such individual that indicates each chapter of this title under which such individual may proceed.

(c) If notice is required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court, such notice shall contain the name, address, and taxpayer identification number of the debtor, but the failure of such notice to contain such information shall not invalidate the legal effect of such notice.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was 29 U.S.C. § 1001, *et seq.*

Petitioners Robinson, Welch and Carney sought leave with the district court to file a proof of claim as unsecured creditors and to file an untimely administrative claim against a bankruptcy estate. At the time of the bankruptcy filing, Robinson and Welch were employees or otherwise affiliated with the debtors. Approximately three years after the bankruptcy filing date, Robinson was appointed to serve as the Plan Administrator for the Landmark Group Insurance Plan ("Plan") and Landmark 501(c)(9) Trust Agreement ("Trust"), for the Landmark Group. Approximately that same time, Welch and Carney became Trustees of the Trust. Appendix ("App."), p. 10.

While an employee and prior to her appointment as Plan Administrator, Robinson became aware of the bankruptcy proceedings and certain claims the Plan and the Trust had against the debtors. After being placed in their roles as Plan Administrator and Trustees in 1994, the petitioners attempted to file a claim on April 5, 1996. The bar date for filing a Proof of Claim was March 16, 1992. The deadline to file an administrative claim was May 22, 1993. App. p.6. The Plan and Trust were not provided the requisite actual notice of the bankruptcy proceedings or the bar dates for filing proof of claims.

There is no dispute that the Plan and Trust were not provided actual notice. There is no dispute that Robinson had constructive notice of the bankruptcy proceedings. However, there is also no dispute that Robinson did not have notice of the deadline for filing claims.

The district court found that as a former employee, Robinson had "constructive notice" of the bankruptcy, and therefore denied petitioners' Motion For Leave to File Their Proofs of Claims finding both claims time barred. The district court's ruling on this issue reads in its entirety:

> Claimants [sic] claims are also time barred. It is clear from the record before this court that claimant Robinson was aware of the payments to the 'ineligibles' as early as 1989. The claims bar date was established by this court as March 16, 1992. Additionally, a bar date for administrative claims was established as May 22, 1993. The claimants have missed both dates by several years.
>
> Pursuant to Federal Rule of Bankruptcy Procedure 9006(b)(1), this court may permit an untimely claim if the failure to file a timely claim was the result of 'excusable neglect'. Claimants argue that because they were not provided notice in the bankruptcy cases and that because they did not obtain independent counsel until after the bar date had passed, that their failure to timely file is excusable. This court does not agree.
>
> Known creditors are entitled to notice of bankruptcy proceedings and the relevant bar dates. Unknown creditors, however are merely entitled to constructive notice of the pending bankruptcy proceeding and of relevant bar dates. See *Mullane* [with citation]. It is clear from the record before this court that at the time of the bankruptcy filing, claimant Robinson knew of the facts giving rise to the claims that claimants now attempt to assert. It is also clear that

> Robinson knew that bankruptcy was filed and knew that a reorganization was approved. App. pp.12-13.

After discussion of the standard for excusable neglect, and placing the burden of proof on claimants, the court noted: "While they [petitioners here] may not have received actual notice, they certainly had constructive notice of the bankruptcy and bar date". App. p.14.

Petitioners appealed on the basis that constructive notice was inadequate to satisfy their due process rights to actual notice and that the claims should be allowed, even if not timely. App. p.6. The United States Court of Appeals for the Fourth Circuit panel did not reach the issues of whether petitioners asserted valid claims, but instead only determined the district court did not err in ruling that their claims were not timely. App. p.4. The panel found that the district court was correct that Ms. Robinson's "constructive notice" of the bankruptcy proceedings satisfied due process by providing appellants "adequate notice". After noting that appellants' premier contention was denial of due process predicated upon the failure of the debtors to issue actual notice to them, the panel's disposition of the issue reads in its entirety:

> Due process requires notice that is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane* [with citation]; *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251, 1257 (4th Cir.), *cert. denied*, 118 S.Ct. 417 (1997). The district court found that '[w]hile [the claimants] may not have received actual notice, they certainly had constructive notice of the

> bankruptcy and bar date'. It explained that each of the Claimants was either employed by or affiliated with the Debtors. Furthermore, claimant Robinson had stated that she knew of the potential claims even before the bankruptcies. We agree that the Claimants had adequate notice. App. pp.6-7.

Petitioners were known creditors at the time the bankruptcy proceedings were commenced. The bankruptcy schedules themselves reference an "Insurance Liability" of unknown amount referring to health plan payments which had not been paid and were due on the date the proceedings were commenced.[1] App. pp.22-25. Additionally, on December 4, 1991, the district court approved an application filed by the debtors two weeks after the bankruptcy was commenced for the purpose of paying pre-petition health claims of the debtors' employees. In response to the debtors' application, the district court entered an order authorizing the payment of certain health plan payments up to the amount of $906,000.00. App. pp.26-30. Despite these references to the health plan in the bankruptcy schedules and the court's order, the Plan and Trust were not listed as creditors of the bankruptcy estate and did not receive actual notice of the proceedings.

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[1] The bankruptcy schedules (as well as the district court Order of December 4, 1991) were the subject of Appellants' Motion to Supplement the Joint Appendix which was granted by the panel. App. p.6.

ARGUMENT

The United States Court of Appeals for the Fourth Circuit has entered a decision in conflict with decisions of this Honorable Court and of other Courts of Appeals, and has departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, calling for the exercise of this Court's supervisory power. The questions presented for review are conceptually distinct, yet jurisprudentially intertwined, and for the sake of brevity, will be argued as a single proposition.

Both statutory and constitutional implications arise when a debtor fails to cause notice of bankruptcy proceedings to issue to a creditor whose identity is known. That failure vitiates the mandate of 11 U.S.C. § 342(a) that "such notice as is appropriate" be given, since the notice appropriate for a known creditor is actual notice. The constitutional component implicated is the due process right afforded by the Fifth Amendment to the fundamental fairness of notice as a prerequisite to participation in proceedings affecting one's interests. Fundamental fairness requires actual notice to a known creditor.

The United States Court of Appeals Fourth Circuit panel failed to consider whether petitioners were "known creditors" of the bankruptcy estate on the date that the debtor filed bankruptcy. Instead, the panel focused on whether one of the petitioners knew that a bankruptcy proceeding had been commenced. Due process requires that debtors provide known creditors actual notice. The panel's focus should have been upon the significance of the fact that petitioners were known creditors to whom

notice was not given, and not upon the fact that one of petitioners may have had constructive knowledge of the bankruptcy proceedings.

The panel did not consider legally significant what the debtor, knowing of petitioners' claims, was obligated to do. The panel focused instead on what the petitioners failed to do, given that one of them knew of the bankruptcy proceedings. In this application, "constructive notice" does not imply substituted notice, such as by publication, but rather mere "inquiry notice". What became significant, erroneously, was what petitioners "should have known" and "should have done".

By focusing on the wrong fact, the panel, like the district court, applied the wrong law. The legally pertinent question, as determined by this Honorable Court, is whether the debtor knew at the time of institution of bankruptcy proceedings of a given creditor having a claim, and not whether that creditor may be aware of the bankruptcy. *New York v. New York, New Haven & Hartford R.R. Company*, 344 U.S. 293, 296, 73 S.Ct. 299, 97 L.Ed. 333 (1953). Because the debtors in this case knew of petitioners' claims on the date of the bankruptcy, they were compelled to provide actual formal notice, and it was the failure to do so that led to the late-filed claims, and prevents the application of a bar date against petitioners' claims.

The very law cited by the panel and by the district court recognizes that known creditors are entitled to notice different from that of unknown creditors. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). One of the dangers of an

unpublished opinion is that a court may cite a case, yet fail to analyze it, and thus fail to apply its teachings.[2] Citing *Mullane*, the panel concluded that petitioners were entitled only to "constructive notice". Constructive notice is sufficient only in instances where the debtor does not know the specific identity of the creditor. *New York v. New York, New Haven & Hartford R.R. Company, supra.* In cases of a known creditor, actual notice is required before that creditor's rights can be affected by the bankruptcy proceedings.

The panel reached its conclusion on the predicate that *Mullane* holds due process is satisfied by notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". That is not, however, all due process requires, in light of *New York*, issued three years after *Mullane*.

In *New York*, this Honorable Court considered the precise issue of the type of notice required to be provided to known creditors within a bankruptcy setting. *New York* specifically discusses how the notice concerns addressed in *Mullane* should be considered in the context of a bankruptcy proceeding.

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[2] The Fourth Circuit cited only *Mullane* and its own *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251 (4th Cir. 1997). It is unclear why the panel deemed the latter controlling precedent. *Spartan* deals with a party which allowed an order in one jurisdiction to become final, without instituting an appeal, and then sought to attack it collaterally in another jurisdiction. Furthermore, the court found that Spartan Mills conceded that it received notice of every stage of the proceedings that culminated in its lien being subverted.

In *New York*, the City had established liens against the debtor's real property. The debtor filed bankruptcy and sought to have the City's liens extinguished. The debtor contended that the City's failure to participate prior to the expiration of the bar date rendered the liens unenforceable. The City contended however, that the debtor failed to provide actual notice, but instead, notified the debtor only by newspaper publication. The district court found in favor of the debtor and destroyed the City's liens. The Second Circuit affirmed the resulting appeal. This Honorable Court reversed.

This Court held that the City's knowledge of the bankruptcy proceedings through publication notice was not "reasonable notice".

> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred. At page 297.

In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1340, 1347, 99 L.Ed.2d 565 (1988), this Court again recognized (this time, within the context of a probate proceeding) that creditors with reasonably ascertainable names and addresses are entitled to actual notice. This Court held that notice to known creditors in any fashion other than actual personal notice will not satisfy due process, applying its holding in *New York*:

> For example, while we have recognized that in the bankruptcy context there is a need for prompt administration of claims, *United Saving Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 375-376 (1988), we also have required actual notice in bankruptcy proceedings. *Bank of Marin v. England*, 385 U.S. 99 (1966); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953). *See also Mullane v. Central Hanover Bank & Trust Co., supra* at 318-319 (trust proceedings). Probate proceedings are not so different in kind that a different result is required here. At 490-491.

Although many jurisdictions have had opportunity to comment and expand upon this Court's notice jurisprudence, the United States Court of Appeals for the Tenth Circuit is one which has clearly defined the rights of known creditors in comparable situations. In *Reliable Electric Co., Inc. v. Olson Construction Company*, 726 F.2d 620, 622 (10th Cir. 1984)[3], that court determined that a creditor's claim could not be discharged if actual statutory notice was not provided. Even though the creditor in *Reliable* was determined to possess actual knowledge of the bankruptcy proceedings in general, the court concluded it did not receive adequate notice of the confirmation hearing. Therefore, the Tenth Circuit refused to extinguish the creditors' untimely claims.

In *Reliable*, the Tenth Circuit held that even where a creditor knows of the underlying proceedings, the

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[3] *Reliable* was followed in *In Re Unioil*, 948 F.2d 678 (10th Cir. 1991). It should be noted that here, too, bankruptcy proceedings were instituted under Chapter 11. App. p.11.

debtors' failure to schedule creditors and notify them of the specific dates substantially impairs the creditors' due process rights and violates the Fifth Amendment to the United States Constitution. The Tenth Circuit realized that the fundamental issue is the opportunity to be heard when a property interest is at stake and the bankruptcy bar-dates pre-suppose that all creditors and interested parties will be properly notified of all vital steps in the proceedings so they may have the opportunity to protect their interests. Relying upon *New York*, the Tenth Circuit held that a known creditor has a right to assume that he will receive all of the notices required by law before his claim is forever barred.

The United States Court of Appeals for the First Circuit in *In Re Intaco, Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir. 1974) also relied upon *New York* in finding that the failure of a debtor to provide actual notice to a known creditor precludes a finding that a creditor's claim is barred by confirmation. The First Circuit's reasoning in *In Re Intaco* is particularly applicable here:

> Moreover, the fact that the creditor may, as here, be generally aware of the pending reorganization, does not of itself impose upon him an affirmative burden to intervene in that matter and present his claim. The trustee can not avoid his statutory responsibility under Chapter X, to formally provide the required notice, simply because of a creditor's possible familiarity with general aspects of the proceedings. At 99.

The First Circuit relied upon a similar result reached by the United States Court of Appeals for the Third Circuit in *In Re Harbor Tank Storage Co.*, 385 F.2d 111 (3rd

Cir. 1967). That court also followed the *New York* holding that a creditor "has every right to assume" that he will be sent all the notices to which he is entitled.

A final example is *In Re Maya Const. Co.*, 78 F.3d 1395 (9th Cir. 1996), *cert. den., Levin v. Maya Const.*, 519 U.S. 862 (1996). There the court, after squarely noting "it is the debtor's knowledge of a creditor, not the creditor's knowledge of his claim, which controls whether the debtor has a duty to list that creditor", held:

> A debtor must list a creditor whose identity and claim he knows. 11 U.S.C. § 521. The burden is on the debtor to cause formal notice to be given; the creditor who is not given notice, even if he has actual knowledge of reorganization proceedings, does not have a duty to investigate and inject himself into the proceedings. At 1399.

CONCLUSION

As petitioners were known creditors but were not afforded actual notice, they were improperly denied the right to file their claim. Although they, or one of them, had constructive notice of the underlying bankruptcy proceedings, they did not receive notice sufficient to apprise them of the vital steps of the bankruptcy process. The panel's decision that constructive notice of the bankruptcy proceedings was "adequate" and satisfied due process was incorrect. The order of the Fourth Circuit affirming the determination of the district court should

be vacated, on instructions that petitioners be given leave to file claims on behalf of the Plan and Trust.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In Re: CLOCK TOWER PLACE INVESTMENTS, LIMITED, a California corporation; LANDMARK LAND COMPANY OF CAROLINA, INCORPORATED, a Delaware corporation; LANDMARK LAND COMPANY OF OKLAHOMA, INCORPORATED, an Oklahoma corporation; LANDMARK LAND COMPANY OF FLORIDA, INCORPORATED, a Delaware corporation; LANDMARK LAND COMPANY OF LOUISIANA, INCORPORATED, a Louisiana corporation; LANDMARK LAND COMPANY OF CALIFORNIA, INCORPORATED, a Delaware corporation, *Debtors.*	)	No. 98-2061
GLORIA ROBINSON, as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement for the Landmark Group AND as a participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group; MICHAEL WELCH, Trustee of the 501(c)(9) Trust Agreement for the Landmark Group AND as a Participant of the Landmark Group Insurance Program and the 501(c)(9)	)	

Trust Agreement for the Landmark Group; V. JACKSON CARNEY, as Trustee for the Landmark Group AND as a participant of the Landmark Group Insurance Program 501(c)(9) Trust Agreement for the Landmark Group AND as persons entitled to receive benefits under the Landmark 501(c)(9) Trust,

Plaintiffs-Appellants,

v.

CLOCK TOWER PLACE INVESTMENTS, LIMITED; RESOLUTION TRUST CORPORATION, AS CONSERVATOR FOR OAK TREE FEDERAL SAVINGS BANK IN RECEIVERSHIP AND ITS SUCCESSOR THE FEDERAL DEPOSIT INSURANCE CORPORATION; LANDMARK LAND COMPANY OF FLORIDA, INCORPORATED; LANDMARK LAND COMPANY OF OKLAHOMA, INCORPORATED; LANDMARK LAND COMPANY OF CAROLINA, INCORPORATED; LANDMARK LAND COMPANY OF LOUISIANA, INCORPORATED; LANDMARK LAND COMPANY OF CALIFORNIA, INCORPORATED; NORTHERN CALIFORNIA RANCH, INCORPORATED, formerly known as Carmel Valley Ranch,

Defendants-Appellees,

v.

TRUST AGREEMENT FOR THE LANDMARK GROUP, V. Jackson Carney, Gloria Robinson and Michael Welch are trustees/administrators of the "Trust",

Third Party Defendant.

Appeal from the United States District Court for the District of South Carolina, at Charleston.
Falcon B. Hawkins, Chief District Judge.
(CA-95-4005-2-1, CA-91-3286-2-1, CA-91-3291-2-1, CA-91-3290-2-1, CA-91-3289-2-1, CA-91-3288-2-1, CA-96-3522-2-1, BK-91-5814, BK-91-5815, BK-91-5816, BK-91-5817; BK-91-5819, BK-91-5818)

Argued: January 29, 1999

Decided: March 29, 1999

Before WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Henry Blanton Brown, H. BLANTON BROWN & ASSOCIATES, Oklahoma City, Oklahoma, for Appellants, Daniel Glann Lonergan, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellees. **ON BRIEF:** Thomas S. Tisdale, Jr., Stephen P. Groves, Sr., YOUNG, CLEMENT, RIVERS & TISDALE, L.L.P., Charleston, South Carolina; Gerald P. Green, Paul G. Summars, PIERCE, COUCH, HENDRICKSON, BAYSINGER & GREEN, Oklahoma City, Oklahoma, for Appellants. Ann S. DuRoss, Assistant General Counsel, Lawrence H. Richmond, Acting Senior Counsel, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C.; Rex Veal, G. Patrick Watson, POWELL, GOLDSTEIN, FRAZER & MURPHY, Atlanta, Georgia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The plaintiffs-appellants (the "Claimants") in this case sought to file an untimely administrative claim and proof of claim against a bankruptcy estate. The district court denied the motion to file these claims, finding the claims to be time barred. The court rejected the Claimants' contention that the late filing was due to excusable neglect. The court also held that the Claimants failed to set forth a valid administrative claim under § 503(b) of the Bankruptcy Code, 11 U.S.C. § 503(b) (1994). We affirm because the claims were time barred and the district court did not abuse its discretion in refusing to accept the late filing. We therefore do not reach the question of whether the Claimants stated a valid administrative claim.

I.

The Claimants, Gloria Robinson, V. Jackson Carney, and Michael Welch, were participants in an employee welfare benefit plan (the "Plan") established by the Landmark companies. The Landmark companies developed, owned, and managed a large portfolio of residential resort communities. Clock Tower Place Investments, Ltd. ("Clock Tower") was a holding company for the Landmark companies, and Oak Tree Savings Bank ("Oak Tree") was the sole owner of Clock Tower.

In October 1991 Clock Tower and its subsidiaries (collectively, the "Debtors") petitioned for Chapter 11 relief. Immediately following the bankruptcy of the Debtors, the Office of Thrift Supervision placed Oak Tree

in receivership and appointed the Resolution Trust Corporation ("RTC") as its receiver. Upon the dissolution of the RTC, the FDIC took its place. Thus the FDIC now controls Oak Tree and all its subsidiaries, including Clock Tower.

In order to ensure adequate funding after bankruptcy for the (benefits) Plan, a voluntary employees' beneficiary association trust (the "Trust") was created in accordance with 26 U.S.C. § 501(c)(9) (1994). The Trust Agreement provides that no funds may "be used for, or diverted to, purposes other than to provide the benefits contemplated under the Plan for the exclusive benefit of covered employees and their dependents, except [taxes and administrative expenses]." However, between 1988 and 1994 the Plan paid more than $900,000 of medical benefits to certain non-employees, including independent contractor golf pros. The benefits were paid because of misrepresentations by former Landmark corporate officers and Plan fiduciaries. The Claimants assert that counsel for Clock Tower told them that unless the Trust was reimbursed for these improper payments, it could lose its tax-exempt status.

In December 1995 the Claimants commenced an adversary proceeding against Clock Tower, the Landmark companies, the RTC, and the FDIC. They alleged breaches of fiduciary duties under ERISA and sought reimbursement for payments improperly made from the Plan. The district court dismissed that action for lack of subject matter jurisdiction.

On April 5, 1996, the Claimants moved to file an administrative claim and proof of claim with the district

court, seeking $2,100,000 from the Debtors. The court denied these claims, finding them to be time barred. The bar date for filing a proof of claim was March 16, 1992. The bar date for administrative claims was May 22, 1993. The court rejected the Claimants' assertion that their failure to file a timely claim was the result of "excusable neglect." The district court also ruled on the merits on one issue, finding that the Claimants failed to present a valid administrative claim under § 503(b) of the Bankruptcy Code. The Claimants appeal.[1]

II.

It is undisputed that the Claimants sought to file their claims long after the bar dates established by the district court. Claimants nonetheless contend that they were denied due process because they were not given notice of the bankruptcy. Alternatively, they argue that the late filing was the result of excusable neglect.

Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251, 1257 (4th Cir.), *cert. denied*, 118 S.Ct. 417 (1997). The district court found that "[w]hile [the Claimants] may not have received actual notice, they certainly had constructive notice of the bankruptcy and bar date." It explained that

---

[1] The Claimants have moved to supplement the Joint Appendix. We grant this motion.

each of the Claimants was either employed by or affiliated with the Debtors. Furthermore, claimant Robinson had stated that she knew of the potential claims even before the bankruptcies. We agree that the Claimants had adequate notice.

As to excusable neglect, Bankruptcy Rule 9006(b)(1) permits a court to allow untimely claims if the failure to file was the result of "excusable neglect."[2] We review the district court's refusal to find excusable neglect for abuse of discretion. *Heyman v. M.L. Marketing Co.*, 116 F.3d 91, 96 (4th Cir. 1997).

The determination of excusable neglect "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993).

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[2] Bankruptcy Rule 9006(b)(1) states:

> [W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr.Proc. 9006(b)(1).

The district court applied this analytical framework and concluded that there was no excusable neglect. It explained that allowing the late claim would hinder the administration of the bankruptcy estate and would prejudice the Debtors and their last remaining creditor, the FDIC. It noted that this case had been before the court for many years and that the Debtors had already sold all but one of their assets and made distributions (under the reorganization plan) to most creditors. It also suggested that the Claimants "have not acted entirely in good faith." It explained that instead of initially filing a proof of claim, the Claimants commenced an adversary proceeding. They only sought to file a proof of claim after their identical claims in the adversary proceeding were dismissed for lack of jurisdiction. Based on this reasoning, the district court did not abuse its discretion in refusing to find excusable neglect.

Because we agree that the claims were time barred, we do not reach the question of whether the Claimants presented a valid administrative claim under § 503(b) of the Bankruptcy Code.

The judgment of the district court is therefore

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

In Re:	2:95-4005-1 2:96-3522-1
LANDMARK LAND COMPANY OF CAROLINA, INC., a Delaware corporation;	CA# 2:91-3287-1 Bk# 91-05814
LANDMARK LAND COMPANY OF OKLAHOMA, INC., an Oklahoma corporation;	CA# 2:91-3286-1 Bk# 91-05815
LANDMARK LAND COMPANY OF FLORIDA, INC., a Delaware corporation;	CA# 2:91-3291-1 Bk# 91-05816
LANDMARK LAND COMPANY OF LOUISIANA, INC., a Louisiana corporation;	CA# 2:91-3290-1 Bk# 91-05817
LANDMARK LAND COMPANY OF CALIFORNIA, INC., a Delaware corporation;	CA# 2:91-3289-1 Bk# 91-05819
CLOCK TOWER INVESTMENTS, INC., a California corporation;	CA# 2:91-3288-1 Bk# 91-05818
Debtors.	**ORDER** (Filed Jun. 19, 1998)

This matter is before the court on a Motion for Allowance of Administrative Claim and to Consider Unsecured Proof of Claim Out of Time filed by the following claimants: Gloria Robinson, ("Robinson") as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement; and Michael Welch ("Welch") and V. Jackson Carney, III, ("Carney") as Trustees of the 501(c)(9) Trust Agreement and as participants in the Landmark Insurance Group Plan.

In this particular matter, plaintiffs have moved for allowance of a late "administrative claim" and a proof of claim seeking some 2.1 million from the Debtors in these cases. The plaintiffs are also involved in two adversary cases presently before this court based upon the same factual issues. *Robinson, et al. v. Clock Tower Place Investments, et al.*, 2:95-4005-1 ("Robinson I"); *Robinson, et al v. Clock Tower Place Investments, et al.*, 2:96-3522-1 ("Robinson II"). The plaintiffs' claims in Robinson I were dismissed by this court for lack of jurisdiction and the Fourth Circuit Court of Appeals affirmed that decision. Robinson II was filed after the Robinson I plaintiffs allegedly exhausted their administrative remedies. This motion was filed after the initiation of Robinson I but before the filing of Robinson II.

The plaintiffs are no longer administrators, trustees, or participants. At the time this motion was filed, however, the claimants were as follows: Robinson was the Plan Administrator of the Landmark Insurance Group Plan (the "Plan") and Landmark 501(C)(9) Trust Agreement (the "Trust") for the Landmark Group, and was also a participant in the Landmark Group Insurance program. Welch and Carney were the Trustees of the Trust and additionally, were participants under the Plan. Robinson served as Plan Administrator by virtue of an agreement with the Plan Sponsor, Clock Tower Place Investments, Ltd. ("Clock Tower"). Welch and Carney served as Trustees by virtue of an appointment by Clock Tower.

What claimants complain of are certain payments, mostly pre-bankruptcy and before the establishment of the Trust, to golf professionals who allegedly were not

eligible to participate in Landmark's Health Plan. According to the claimants, beginning in 1989, the names of certain individuals who did not qualify for Plan benefits were submitted to the Health Plan's Claims Administrator. The claimants estimate that the amount paid to the allegedly ineligible claimants from 1989 to 1995 was approximately Nine Hundred Thousand and No/100 Dollars ($900,000.00). The claimants also argue that the debtors-in-possession failed to fund the initial reserve amount of the newly created trust in a timely fashion, and failed to repay payments made to a party in interest (as the term is defined in ERISA) in a timely fashion. Based upon these arguments, the claimants conclude that the debtor is indebted to movants in the additional amount of Three Hundred Eight Thousand and No/100 Dollars ($308,000.00). The remainder of the 2.1 million dollars claimed is made up of interest which claimants argue is also owed to the Trust.

A brief factual history is as follows: On October 11, 1991, the debtors (with the exception of Carmel Valley Ranch) filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code. Carmel Valley Ranch initiated its voluntary Chapter 11 petition on December 18, 1992. The debtors have been jointly administered, and a combined Plan of Reorganization was confirmed by this court acting in Bankruptcy on March 18, 1993, for all debtors.

On October 12, 1991, the day after the majority of the debtors filed their bankruptcy petitions, the debtors created a Trust Agreement under 501(c)(9) of the Internal Revenue Code. That Trust Agreement was established to provide medical benefits to employees of the Landmark

Group. Prior to the establishment of the Trust, the Landmark Group paid insurance benefits to employees through the Landmark Insurance Group Plan. The plan documents identify Landmark Land Company, Inc. as the plan sponsor of the plan from November 11, 1989 until 1993 and then the newly formed New Clock Tower and its affiliates.

This court finds that the claimant's motion should be denied. First, the court finds that the claimants have not set forth an administrative claim. Section 503(b) of the Bankruptcy Code provides that only the actual and necessary costs and expenses of preserving the estate shall be allowed as administrative expenses. In order to be entitled to administrative status, a claim must confer a concrete benefit to the estate, not just the mere potential of a benefit.

The claimants have failed to show what benefit they claim that the estates will gain through the payment of the medical benefits. They argue that the estates received some tax benefit and some benefit from the services provided by the ineligible golf professionals. There is nothing, however, to support the claim that such alleged benefits were actual and necessary costs of preserving the estate. Claimants have not shown what post petition benefit was received by the estates as a result of these claims.

Claimants claims are also time barred. It is clear from the record before this court that claimant Robinson was aware of the payments to the "ineligibles" as early as 1989. The claims bar date was established by this court as

March 16, 1992. Additionally, a bar date for administrative claims was established as May 22, 1993. The claimants have missed both dates by several years.

Pursuant to Federal Rule of Bankruptcy Procedure 9006(b)(1), this court may permit an untimely claim if the failure to file a timely claim was the result of "excusable neglect." Claimants argue that because they were not provided notice in the bankruptcy cases and that because they did not obtain independent counsel until after the bar date had passed, that their failure to timely file is excusable. This court does not agree.

Known creditors are entitled to notice of bankruptcy proceedings and the relevant bar dates. Unknown creditors, however are merely entitled to constructive notice of the pending bankruptcy proceeding and of relevant bar dates. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, (1950). It is clear from the record before this court that at the time of the bankruptcy filing, claimant Robinson knew of the facts giving rise to the claims that claimants now attempt to assert. It is also clear that Robinson knew that bankruptcy was filed and knew that a reorganization was approved.

The Supreme Court in *Pioneer Investment Services v. Brunswick Associates*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993), set forth the applicable standards with respect to excusable neglect:

> . . . the determination [of excusable neglect] is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's commission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential

> impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The burden of proving these standards rests with the Claimants and they have failed to show any valid documented reason for why they did not file a timely proof of claim. While they may not have received actual notice, they certainly had constructive notice of the bankruptcy and the bar date. Each of the claimants were either employed by or in some way affiliated with the Debtors. Further, Claimant Robinson has stated that she knew of the potential claims even before the bankruptcies. Further, allowing the filing of a claim at this late date will prejudice the debtors and their last remaining creditor, the FDIC acting as receiver for Oak Tree Federal Savings Bank. The allowance of such a late claim would also hinder the administration of the Debtor's case. These bankruptcy cases have been before this court for many years and the Debtors have already sold all but one of their assets and made Plan distributions to a majority of the creditors. Allowing the claimants' claim at this late date would seriously undermine the confirmation of the plan. Finally, the claimants have not acted entirely in good faith. When the claimants eventually made their claim, instead of filing a motion to file proof of claim, they filed an adversary proceeding. This motion to file a proof of claim was not filed until this court dismissed claimants' identical claims for lack of jurisdiction.

Therefore, based on the foregoing, it is,

ORDERED that Claimant's motion to file these untimely claims is DENIED.

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
FALCON B. HAWKINS
United States
District Judge

Charleston, South Carolina
June 19th 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 98-2061

IN RE:

LANDMARK LAND COMPANY OF CAROLINA, INC., a Delaware corporation; LANDMARK LAND COMPANY OF OKLAHOMA, INC., an Oklahoma corporation; LANDMARK LAND COMPANY OF FLORIDA, INC., a Delaware corporation; LANDMARK LAND COMPANY OF LOUISIANA, INC., a Louisiana corporation; LANDMARK LAND COMPANY OF CALIFORNIA, INC., a Delaware corporation; CLOCK TOWER PLACE INVESTMENTS, LTD., a California corporation;

Debtors,

GLORIA ROBINSON, as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement for the Landmark Group, and GLORIA ROBINSON, as a Participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, and MICHAEL WELCH, Trustee of the 501(c)(9) Trust Agreement for the Landmark Group, and MICHAEL WELCH as a Participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, and V. JACKSON CARNEY, III as Trustee of the 501(c)(9) Trust Agreement for the Landmark Group, and V. JACKSON CARNEY, III as a Participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark

Group, and as persons entitled to receive benefits under the Landmark 501(c)(9) Trust,

Appellants,

-versus-

CLOCK TOWER PLACE INVESTMENTS, LTD., and the RESOLUTION TRUST CORPORATION as Conservator for Oak Tree Federal Savings Bank in Receivership, and its successor, the FEDERAL DEPOSIT INSURANCE CORPORATION, and LANDMARK LAND COMPANY OF FLORIDA, INC., and LANDMARK LAND COMPANY OF OKLAHOMA, INC., and LANDMARK LAND COMPANY OF CAROLINA, INC. and LANDMARK LAND COMPANY OF LOUISIANA, INC. and LANDMARK LAND COMPANY OF CALIFORNIA, INC., and NORTHERN CALIFORNIA RANCH, INC., (Formerly Carmel Valley Ranch, Inc.),

Appellees.

MOTION TO SUPPLEMENT JOINT APPENDIX

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Attorneys for the Appellants

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COMES NOW the Appellants, Gloria M. Robinson ("Robinson"), V. Jackson Carney, III ("Carney"), and Michael Welch ("Welch"), pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Fourth Circuit Local Rule 27, and respectfully requests this Court of Appeals to permit them to supplement the Joint Appendix.

During the recent oral argument in this case, this Court of Appeals was presented the issue of whether the Clock Tower Group Medical Program was a *known* creditor of the Landmark Land Companies' Bankruptcy Estate. During the Appellants' counsel's argument on this issue, he directed the Circuit Panel's attention to the "Summary of Amended Schedules" (the "Summary") filed by the Appellee, Clock Tower Place Investments, Ltd., in the United States Bankruptcy Court for the District of South Carolina, sometime after February 18, 1992. (A copy of the Summary is attached hereto as Exhibit "A"). The Summary contained a document entitled "Schedule F –

Creditors Holding Unsecured Nonpriority Claims" which, in turn, provided the following language:

> The [D]ebtor self-insures its group medical and life insurance programs up to a maximum of $75,000 each per employee, before reinsurance. As of [the bankruptcy] petition date, approximately $4,495 in claims were outstanding for the group insurance plans. According to the consent order entered on December 4, 1991, Debtor received permission to pay these pre-petition employee claims. The [D]ebtor has established a trust into which the post-petition premiums are paid for the self-insurance programs. In addition, the [D]ebtor participates in jointly administered general liability work[er's] compensation, and auto[mobile] liability policies to which aggregate self[I]nsured retentions, or deductibles, are held by the [insurance] carriers.

(Schedule F, Footnote 3). In addition, Appellants' counsel also referred to the Consent Order filed December 4, 1991, which approved the Debtor's payment of Landmark employees' pre-petition claims. (A copy of the Consent Order is attached hereto as Exhibit "B").

These documents were not contained in the Joint Appendix but, pursuant to Rule 30(a)(2), *FRAP*, are still a part of the record. The Rule provides "[p]arts of the record may be relied on by the court or the parties even though not included in the [Joint] Appendix." Rule 30(a)(2), *FRAP*. These documents are essential to this Court of Appeals' determination of the "known creditor" issue. Consequently, the Appellants respectfully request permission to submit these documents to this Court of Appeals as a supplement to the Joint Appendix.

Pursuant to Fourth Circuit Local Rule 27(a), counsel for the Appellants has advised opposing counsel of the filing of this motion. Appellants' counsel has not been advised, as of yet, of opposing counsels' position, but suspects opposing counsel may file an objection to this motion.

Respectfully submitted,

YOUNG, CLEMENT, RIVERS & TISDALE, LLP

Signed:

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Charleston, South Carolina

February 25, 1999

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of February, 1999, a correct and true copy of the Plaintiffs' **Motion to Supplement Joint Appendix** was served on all counsel of record via U.S. Mail at the following addresses:

Rex R. Veal, Esquire
G. Patrick Watson, Esquire
POWELL, GOLDSTEIN, FRAZER & MURPHY
191 Peachtree Street, N.E., Suite 1600
Atlanta, Georgia 30303

Ann S. DuRoss, Esquire (Assistant General Counsel)
Federal Deposit Insurance Corporation
H-3003
550 17th Street, N.W.
Washington, D.C. 20429

Attorneys for Appellees FDIC & RTC

/s/ Stephen P. Groves, Sr.
Stephen P. Groves, Sr.

Charleston, South Carolina

February 25, 1999

FILED
1991 8 1992
ANN A. BIRCH, CLERK
COLUMBIA, SC

United States Bankruptcy Court

District of South Carolina

In re Clock Tower Place Investments Ltd.
Debtor

Case No. 2:91-3288-1
(If known)

SUMMARY OF AMENDED SCHEDULES

Schedules B, E and F contained herein are intended to replace the same contained in the original Schedules on file herein. Schedule G, if attached, is a supplement to the existing Schedule G. Exhibits, if any, to these Schedules remain unchanged and are not included herein.

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts from Schedules D, E, and F to determine the total amount of the debtor's liabilities.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	AMOUNTS SCHEDULED ASSETS	LIABILITIES	OTHER
A - Real Property	Yes	1	$ -0-		
B - Personal Property	Yes	8	$1,197,871,414		
C - Property Claimed As Exempt	No	N/A			
D - Creditor Holding Secured Claims	Yes	1		$ -0-	
E - Creditors Holding Unsecured Priority Claims	Yes	1		$ 1,287	
F - Creditors Holding Unsecured Nonproperty Claims	Yes	21		$ 885,751,666	
G - Executory Contracts and Unexpired Leases	Yes	7			
H - Codebtors	Yes	1			
I - Current Income of Individual Debtor(s)	No	N/A			$ N/A
J - Current Expenditures of Individual Debtor(s)	No	N/A			$ N/A
Total Number of sheets In ALL Schedules ►		40			
Total Assets ►			$1,197,871,414		
Total Liabilities ►				$ 885,755,953	

EXHIBIT "A"

App. 22

BEST AVAILABLE COPY

Clock Tower Place Investments Ltd.
a Delaware corporation
Schedule F – Creditors Holding Unsecured
Nonpriority Claims
Case No.: 2:91–3288–1
Amended as of February 3, 1992

Account No./ Name & Address	Claim Date/ Description	Status	Amount (as of 10/11/91)
Upon Debtor's initial review and investigation of its liabilities, the Debtor is unaware if some of the foregoing claims are contingent, unliquidated, or disputed. The Debtor will continue its review of these liabilities, which may result in a determination that claims listed herein are in fact contingent, unliquidated or disputed. Therefore, the Debtor reserves the right to amend these schedules and notify the creditors as necessary.			
Accounts Payable Trade – See Attached.			$203,276
263000-487900 Tower Commercial Corp. 5300 Hollister, No. 260 Houston, Texas 77040	Earnest money deposit on pending sale of John Kushner & Associates, Subsidiary	C	$10,000
190200-488000 Dixie Insurance Agency P.O. Box 55108 Metairie, LA 70055-5108	Intercompany Payable Resulting from Net Cash Sweeps and Fundings through the Centralized		$1,693,758

Cash Management System of Oak Tree Savings Bank and Subsidiaries.

190300-488000 Landmark Title 233 Carondelet St. New Orleans, LA 70130 Intercompany payable – (SAME AS ABOVE)		$51,950
190700-488000 Landmark of Arizona 23150 N. Pima RD, Suite 8 Scottsdale, AZ 85255 Intercompany Payable – (SAME AS ABOVE)		$100
190800-488000 Dixie Finance 6801 Press Dr. New Orleans, LA 70126 Intercompany Payable – (SAME AS ABOVE)		$32,989
191500-488000 Landmark Financial Services 226 Carondelet St. 14th Floor New Orleans, LA 70130 Intercompany Payable – (SAME AS ABOVE)		$2,603,462
192200-488000 Oak Tree Savings/RTC 233 Carondelet St. New Orleans, LA 70130 Intercompany Payable – (SAME AS ABOVE)	D	$878,857,962

n/a $2,765

Well [sic] Fargo Bank
Carmel, CA

Payable for negative bank
account balances of subsidiaries
at Wells Fargo Bank on 10/11/91.

192300-488000 $2,295,404

Landmark Life Ins. Co.
433 Metairie RD, Suite 520
Metairie, LA 70130

Intercompany Payable –
(SAME AS ABOVE)

Insurance Liability

See Footnote 3 following

Total $885,751,666

Footnote 1:

The status of the claim is indicated by the letter C=Contingent; U=Unliquidated; or, D=Disputed, if known.

Footnote 2:

Debtor has certain accrued vacation liability and other amounts due to employee for wages or benefits as of petition date. However, this liability is not reflected in the Debtor's schedules for the reason that the Debtor has obtained Court approval to pay such amounts as might come due in the ordinary course of business. (See order entered 12/4/91.)

Footnote 3:

The debtor self-insures its group medical and life insurance programs up to a maximum of $75,000

each per employee, before reinsurance. As of petition date, approximately $4,495 in claims were outstanding for the group insurance plans. According to a consent order entered on December 4, 1991, Debtor received permission to pay these pre-petition employee claims. The debtor has established a trust into which post-petition premiums are paid for the self insurance programs. In addition, the debtor participates in jointly administered general liability workman's compensation, and auto liability policies pursuant to which aggregate self insured retentions, or deductibles, are held by the carriers.

EXHIBIT "B"

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

In Re:	)	CIVIL ACTION
	)	#2:91-3286-1
LANDMARK LAND COMPANY OF OKLAHOMA, INC., an Oklahoma Corporation;	)	Bankruptcy
	)	#91-05815
	)	
Debtor.	)	*CHAPTER 11*
	)	

CONSENT ORDER APPROVING DEBTOR'S PAYMENT OF EMPLOYEES' PRE-PETITION CLAIMS

(Filed Dec. 4, 1991)

This matter is before the Court on Application for Approval of Payment of Employees' Prepetition Claims,

including all amendments and supplements thereto (the "Application"), filed and served by the Debtor on October 25, 1991. A response to the Application was filed by the Resolution Trust Corporation, as Conservator for Oak Tree Federal Savings Bank ("RTC") including all amendments and supplements thereto (the "RTC Response"). The RTC has concurred in the payment of those employee pre-petition claims as are within the priorities provided by Bankruptcy Code Sections 507(a)(3) and 507(a)(4), 11 U.S.C. §§507(a)(3) and (4). The Debtor has sought payment of amounts of pre-petition travel and entertainment expense claims and other claims which, in some instances, may be in excess of the limitations provided by such Bankruptcy Code priority sections.

Appearing at the hearing were: the Office of the United States Trustee ("OUST"), by and through Joseph F. Buzhardt, Assistant United States Trustee ("AUST"); Patrick Michael Duffy of the firm McNair Law Firm, P.A. for the Debtor; Lawrence W. Johnson, Jr. of the firm Adams, Quackenbush, Herring & Stuart, P.A. for the RTC; and Joseph F. Buzhardt for the CUST; plus such other parties-in-interest as set forth in the recorded transcript of the hearing.

Upon review and consideration of the Application, the declarations and evidence in support of the Application, upon the record in this case and the record of the hearings held before this Court on November 26, 1991, and December 2, 1991, including the arguments and stipulations of counsel, the RTC Response, and upon agreement of the parties in open court, the Court, being fully advised in the premises, hereby ORDERS as follows:

1. Notice of the hearing on the Application was duly and properly given and was adequate and appropriate under the circumstances.

2. No objection to the Application has been filed or presented to the Court or parties.

3. For good cause shown, the Court hereby approves the payment of the employees' pre-petition claims. Therefore, pursuant to 11 U.S.C. §507(a)(3) and 507(a)(4), it is

ORDERED, that the Application is hereby granted; and it is

FURTHER ORDERED, that the Debtor is authorized to pay, forthwith, all those pre-petition claims as are entitled to priority within the meaning of Bankruptcy Code Sections 507(a)(3) and 507(a)(4), 11 U.S.C. §§507(a)(3) and (4), specifically, all health benefit claims arising on or before October 11, 1991, the date of filing of the Petition in Bankruptcy; and it is

FURTHER ORDERED, that:

A. Payments to employees of the Debtor which, but for the intervention of the Chapter 11 case, would have been paid under the "Landmark Land Company, Inc. Group Insurance Programs" (collectively, the "Programs") effective November 1, 1989, as such Program was being administered on or prior to October 11, 1991, including, but not limited to, payments to participants who were former employees of the Debtor qualified under COBRA ("Health Plan Payments"), may be paid pursuant to this Order;

B. Health Plan Payments may be paid, provided that the aggregate of all payments does not exceed the aggregate number of all covered employees multiplied by $2,000, less sums paid under 11 U.S.C. §507(a)(3), an aggregate amount which appears far in excess of the estimate of Health Plan Payments provided to the Court by the Debtor. That, for purposes of this Order, said amount is approximately $906,000.00, while the aggregate allowed and allowable by 11 U.S.C. 507 would exceed approximately $6,000,000.00;

C. Health Plan Payments are to be made without discrimination with respect to all persons determined to be employees of the Debtor whose claims are entitled to priority under 11 U.S.C. §507(a)(3) and (4) which is to say that an employee claim arising on or before October 11, 1991, will be processed by the Debtor irrespective of that person's present employment status; and

D. A listing or listings of all persons to whom such payments are made, the amounts thereof, and the source of each such payment shall be provided to this Court, the Office of the United States Trustee, Counsel to RTC, and Counsel to the Unsecured Creditors' Committee appointed in this case as promptly as is reasonably feasible; and it is

FURTHER ORDERED, that, notwithstanding that such Health Plan Payments are authorized to be drawn from funds of the Debtor in this case, the RTC, after reviewing a list of such payments to be provided by the Plan Administrator, shall have the right to object to the

Court within fifteen (15) days of receipt of said list for any payment it deems inappropriate under the Plan.

IT IS SO ORDERED.

/s/ Falcon B. Hawkins
FALCON B. HAWKINS,
CHIEF DISTRICT JUDGE

Charleston, S. C.

December 4th, 1991

WE SO MOVE:

/s/ Patrick Michael Duffy
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AND

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Kiran A. Phansalkar
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ATTORNEYS FOR THE DEBTOR

WE CONSENT:

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by Patrick Duffy with Express permission
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AND

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ATTORNEYS FOR THE RESOLUTION TRUST CORPORATION AS CONSERVATOR FOR OAK TREE FEDERAL SAVINGS BANK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Fourth Circuit Docket No. 98-2061

IN RE:

LANDMARK LAND COMPANY OF CAROLINA, INC., a Delaware corporation;
LANDMARK LAND COMPANY OF OKLAHOMA, INC., an Oklahoma corporation;
LANDMARK LAND COMPANY OF FLORIDA, INC., an Delaware corporation;
LANDMARK LAND COMPANY OF LOUISIANA, INC., an Louisiana corporation;
LANDMARK LAND COMPANY OF CALIFORNIA, INC., an Delaware corporation; CLOCK TOWER PLACE INVESTMENTS, LTD., a California corporation;

Debtors,

GLORIA ROBINSON, as Plan Administrator of the Landmark Group Insurance Plan and the Landmark 501(c)(9) Trust Agreement for the Landmark Group, and GLORIA ROBINSON, as a Participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, and MICHAEL WELCH, Trustee of

the 501(c)(9) Trust Agreement for the Landmark Group, and MICHAEL WELCH as a Participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, and V. JACKSON CARNEY III as Trustee of the 501(c)(9) Trust Agreement for the Landmark Group, and V. JACKSON CARNEY III as a Participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, and as persons entitled to receive benefits under the Landmark 501(c)(9) Trust,

Appellants,

APPELLANTS' PETITION FOR REHEARING EN BANC

-versus-

CLOCK TOWER PLACE INVESTMENTS, LTD. and the RESOLUTION TRUST CORPORATION as Conservator for Oak Tree Federal Savings Bank in Receivership, and its successor, the FEDERAL DEPOSIT INSURANCE CORPORATION, and LANDMARK LAND COMPANY OF FLORIDA, INC., and LANDMARK LAND COMPANY OF OKLAHOMA, INC., and LANDMARK LAND COMPANY OF CAROLINA, INC. and LANDMARK LAND COMPANY OF CALIFORNIA, INC. and NORTHERN

CALIFORNIA RANCH,. INC.
(Formerly Carmel Valley Ranch, Inc.),

Appellees.

APPELLANTS' PETITION FOR REHEARING EN BANC

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

**THE HONORABLE FALCON B. HAWKINS
SENIOR UNITED STATES DISTRICT JUDGE
CIVIL ACTION NO. 2:95-4005-1**

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I. INTRODUCTION

This Petition for Rehearing En Banc is necessary because the panel decision overlooked a material fact in its decision and for the reason that the case below involves a question of exceptional importance in that the decision of the panel is in conflict with a decision of the United States Supreme Court and other United States Courts of Appeals, and the conflict is not addressed in the panel's opinion.

II. POINTS OF LAW AND FACT OVERLOOKED BY THE PANEL

(1) The panel failed to consider whether the Appellants were "known creditors" of the Bankruptcy Estate on

the date that the Debtor/Appellee filed bankruptcy. Instead, the panel focused on whether Appellants "knew" that a Bankruptcy proceeding had been commenced. Controlling case law teaches, that *known creditors* are entitled to receive actual statutory notice. The courts focus should have been upon the factual significance that Appellants were known creditors.

(2) Because the Appellants were known creditors, the panel's decision that Appellants "constructive notice" of the bankruptcy proceedings bars them from filing a late claim conflicts with the decisions of the United States Supreme Court and other United States Court of Appeals. Specifically, these Courts have found general or "constructive notice" is insufficient to foreclose the untimely claim of a known creditor.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Procedural History

The Appellants Robinson, Welch and Carney sought leave with the district court to file a proof of claim both as an unsecured creditor and to also file an untimely administrative claim against a bankruptcy estate. *(See Panel Opinion at Page 4)* At the time of the bankruptcy filing, Robinson and Welch were employees or otherwise affiliated with the Debtors. *(See Panel Opinion at Page 6)* Approximately three years after the bankruptcy filing date, Robinson was appointed to serve as the Plan Administrator for the Landmark Group Insurance Plan ("Plan") and Landmark 501(c)(9) Trust Agreement ("Trust"), for the Landmark Group *(See District Court Order at Page 2)* Approximately that same time, Welch and

Carney became Trustees of the Trust. *(See District Court Order at Page 2)* While and employee and prior to her appointment as Plan Administrator, Robinson became aware of the bankruptcy proceedings and certain claims the Plan and the Trust had against the Debtors. *(See Panel Opinion at Page 6)* The Plan and Trust did not receive actual notice of the bankruptcy proceedings or the bar dates for filing proof of claims. *(See District Court Order at Page 5)*

After being placed in their roles as Plan Administrator and Trustees, the Appellants did not attempt to file a claim until April 5, 1996. *(See Panel Opinion at Page 5)* The bar date for filing a Proof of Claim was March 16, 1992. *(See Panel Opinion at Page 5)* The deadline to file an administrative claim was May 22, 1993. *(See Panel Opinion at Page 5)* The district court found that as a former employee, Robinson had "constructive notice" of the bankruptcy, and therefore denied Appellants' Motion For Leave to File Their Proofs of Claims finding both claims time barred.[1] *(See District Court Order at Page 5)* The Appellants appealed on the basis that constructive notice was inadequate to satisfy Appellants' due process rights to actual notice and that the claims should be allowed, even if not timely. *(See Panel Opinion at Page 5)*

B. The Panel's Opinion

The panel concluded that it did not have to reach the issues of whether the Appellants possessed a valid claim

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[1] The district court also rejected the contention that any late filling was the result of excusable neglect.

as it determined the district court did not abuse its discretion in determining that the Appellants' claims were not timely. *(See Panel Opinion at Page 7)* The panel found that the district court was correct that Ms. Robinson's "constructive notice" of the bankruptcy proceedings satisfied due process by providing Appellants "adequate notice". *(See Panel Opinion at Page 6)* The panel also agreed with the district court's determination that Appellants could not establish any excusable neglect which would permit the filing of these claims after the bar date. *(See Panel Opinion at Pages 6 and 7)*

Appellants seek a rehearing for the reason that the panel, like the district court, focused upon the wrong fact and therefore, applied the wrong law.[2] The factual question, as determined by the Supreme Court of the United States, isn't whether the Appellants possessed an awareness of the bankruptcy proceedings but instead, *whether the debtor knew* at the time of filing that the Appellant was a creditor which might have a claim. *New York v. New York, New Haven & Hartford R.R. Company,* 344 U.S. 293, 296; 73 S.Ct. 299; 97 L.Ed. 333 (1953). Because the Debtors herein knew of the Appellants' claims on the date of the

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[2] Appellants concede, for the purposes of this Petition, that they cannot demonstrate excusable neglect and must lose if that is the law to be applied in the instant case. But, Appellants were not neglectful. Indeed, Appellants contend the failure to receive actual statutory notice led to the late filed claim. The Appellants were not neglectful where they were not given actual notice of the proceeding. The Debtor's failure to satisfy Appellants' due process rights by providing actual statutory notice prevents the application of a bar date against these Appellants. This was the error of the district court and the Panel.

bankruptcy, they were compelled to provide actual formal notice.

C. Appellants Were Known Creditors

Appellants were known creditors at the time the bankruptcy proceedings were commenced. The bankruptcy schedules themselves reference an "Insurance Liability" of unknown amount referring to health plan payments which had not been paid and were due on the date the proceedings were commenced.[3] *(See Exhibit "A")* Additionally, on December 4, 1991, the district court approved an application filed by the Debtors two weeks after the bankruptcy was commenced for the purpose of paying pre-petition health claims of the Debtor's employees. *(See Exhibit "B")* In response to the Debtor's application, the district court entered an order authorizing the payment of certain health plan payments up to the amount of $906,000.00. *(See Exhibit "B" at Page 3)* Despite these references to the health plan in the bankruptcy schedules and the Court's order, the Plan and Trust were not listed as creditors of the bankruptcy estate and did not receive actual notice of the proceedings.

The district court's order and the panel's opinion contain the most convincing fact that establishes that the Plan and Trust were known creditors of the bankruptcy estate. Both found that as an employee, Robinson knew of

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[3] The bankruptcy schedules (as well as the district court Order of December 4, 1991, *Infra*) were the subject of Appellants' Motion to Supplement the Joint Appendix which was granted by the panel. *(See Panel Opinion at Page 5)*

the claims possessed by the Plan and Trust against the Debtors.[4] By this finding the district court and the panel have also necessarily concluded that the Debtor, by virtue of its employee (Ms. Robinson) recognized the existence of these bankruptcy claims. The determination that Robinson knew of the existence of the claims even before the bankruptcy, *(See Panel Opinion at Page 6)* establishes that the Debtor, through its employees, was likewise aware of the claim. Because the Plan and Trust were known creditors of the Debtor which were not provided proper notice of the proceedings, Appellants seek an opportunity for leave to file their late claims on behalf of the Plan and Trust.

D. Findings of the District Court

The very law cited by the district court recognizes that known creditors are entitled to notice different from that of unknown creditors. The district court in its opinion cited to *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, (1950),* for its conclusion that:

> *Known creditors are entitled to notice* of bankruptcy proceedings and the relevant bar dates. *Unknown creditors, however are merely entitled to constructive notice* of the pending bankruptcy proceeding and of relevant bar dates. *(See District Court Order at Page 4)* (Emphasis Added)

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[4] As mentioned earlier, at the time of the bankruptcy filing, Robinson was not the Plan Administrator, but instead served only as an employee of the Debtor.

The district court failed to apply the teachings of *Mullane*. Instead, the district court focused *solely* upon *whether the Appellants were aware* of the bankruptcy proceedings. The district court, in reaching its conclusion, found that Ms. Robinson had "constructive notice" of the proceedings.

> It is clear from the record before this court that at the time of the bankruptcy filing, claimant *Robinson knew of the facts giving rise to the claims that claimants now attempt to assert.* It is also clear that *Robinson knew that bankruptcy was filed and knew that a reorganization was approved.* (Emphasis Added)
>
> * * *
>
> *While they may not have received actual notice, they certainly had constructive notice of the bar date.* Each of the claimants were either employed by or in some way affiliated with the Debtors. Further, Claimant Robinson has stated she knew of the potential claims even before the bankruptcies. *(See District Court Order at Pages 4 and 5)* (Emphasis Added)

The *district court should have focused upon whether the Debtor knew* of the claims possessed by Appellants in their roles as Trustees and Plan Administrator. As mentioned above, by virtue of what the district court determined Ms. Robinson knew as an employee of the Debtor, it is also clear the Debtor also knew of the claims prior to the bankruptcies.

E. The Decisions Of The United States Supreme Court

In its opinion, the panel adopted the same reasoning cited by the district court and also reached the wrong result. The panel concluded that Appellants were only entitled to "constructive notice". Constructive notice however, is only sufficient in cases where the Debtor does not know the specific identity of the creditor. *New York v. New York, New Haven & Hartford R.R. Company,* 344 U.S. 293, 296; 73 S.Ct. 299; 97 L.Ed. 333 (1953). In cases of a known creditor, statutory, formal notice is required before the known creditors rights can be affected by the bankruptcy proceedings. *Id. at 297.* That Appellants may have had "constructive notice" of the bankruptcy proceedings is not enough to satisfy their right to actual notice.

The panel reached its decision that Appellants' "constructive notice" of the proceedings was adequate, quoting *Mullane* for the proposition that:

> "due process requires notice that is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *(See Panel Opinion at Page 6)*

While *Mullane* is an oft-cited case concerning due process and notice issues, the panel failed to consider the United States Supreme Court's decision in *New York,* issued three years after *Mullane.* In *New York,* the Supreme Court considered the precise issue of the type of notice required to be provided to known creditors within a bankruptcy setting. *New York* specifically discusses how the notice

concerns addressed in *Mullane* should be considered in the context of a bankruptcy proceeding. For this reason, the panel's reliance solely upon *Mullane*, as well as *Spartan Mills v. Bank of American Illinois*, 112 F.3d 1251 (4th Cir., 1997), cert. denied, 118 S.Ct. 417 (1997) is misplaced. *New York* is more recent and better authority on this issue.

In *New York*, the City had established liens against the debtor's real property. The debtor filed bankruptcy and sought to have the City's liens extinguished. The Debtor contended that the City's failure to participate prior to the expiration of the bar date rendered the liens unenforceable. The City contended however, that the debtor failed to provide "actual service of notice", but instead, notified the debtor only by newspaper publication. The district court found in favor of the Debtor and destroyed the City's lien. The Second Circuit affirmed the resulting appeal. The Supreme Court however, reversed.

The Supreme Court held that the City's knowledge of the bankruptcy proceedings through publication notice was not "reasonable notice". In this regard, the Supreme Court stated:

> *"Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court.* The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. *But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred.* When the judge ordered notice by mail to be given the

> appearing creditors, New York City acted reasonably in waiting to receive the same treatment.
>
> The statutory command for notice embodies a basic principle of justice – that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice." *New York at 297.*

In the instant matter, the determination that Appellants' "constructive notice" of the Debtor's bankruptcy proceedings was sufficient to satisfy due process is contrary to *New York*. Both the district court and the panel failed to consider whether Appellants were entitled to actual notice the Supreme Court requires be given to a "known creditor". *New York* teaches that "constructive notice" of the proceedings and bar dates is inadequate in cases involving known creditors. *Id. 296-297.* The fact the Appellants, as known creditors, may have been aware of the bankruptcy proceeding is insufficient and not equivalent to the notice required by *New York.*

As recent as 1987, the United States Supreme Court had the opportunity to comment upon the notice to be afforded to known creditors before their claims are extinguished. In *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478, 490; 108 S.Ct. 1340, 1347; 99 L.Ed.2d 565 (1988), the Court again recognized (this time, within the context of a probate proceeding) that creditors with reasonably ascertainable names and addresses are entitled to actual notice. The Court held that notice to known creditors in any fashion other than actual personal notice will not satisfy due process. *Id. at 491.* In reaching its decision

in *Tulsa*, the Supreme Court again referenced its holding in *New York* that known creditors are entitled to actual notice in the bankruptcy setting, stating that:

> For example, while we have recognized that in the bankruptcy context there is a need for prompt administration of claims, *United Saving Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 375-376 (1988), *we also have required actual notice in bankruptcy proceedings. Bank of Marin v. England*, 385 U.S. 99 (1966); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953). *See also Mullane v. Central Hanover Bank & Trust Co., supra* at 318-319 (trust proceedings). Probate proceedings are not so different in kind that a different result is required here. *Id. at 490-491* (Emphasis Added)

Thus, the Court has once asserted that actual notice to creditors who are known or readily ascertainable must be provided to satisfy due process. In further support for its holding that due process requires that known creditors be given actual notice, the Court also cited to *New York*, noting that "(Bankruptcy Code's requirement of "reasonable notice" requires actual notice of deadline for filing claims)". *Id.* at 489. Here, the Debtors ascertained that the Plan and Trust were creditors and included information within the Bankruptcy Petition that referenced the claims concerning health care. Actual notice was required to be given the Plan and Trust. There is no dispute, the Plan and Trust were not provided actual notice. Likewise, there is no dispute that Robinson's constructive notice of the bankruptcy proceedings did not include actual notice of the "deadline for filing claims".

F. Holding Of Other United States Court Of Appeals

Although many jurisdictions have had opportunity to comment and expand upon the Supreme Court's holding in *New York,* the Tenth Circuit Court of Appeals has perhaps most clearly defined the rights of known creditors in cases such as the one here. In *Reliable Electric Co., Inc. v. Olson Construction Company,* 726 F.2d 620 (10th Cir. 1984), the Tenth Circuit determined that a creditor's claim could not be discharged if actual statutory notice was not provided. *Id. at 622.* Even though the creditor in *Reliable* was determined to possess *actual knowledge* of the bankruptcy proceedings in general, the Court concluded it did not receive adequate notice of the confirmation hearing. Therefore, the Tenth Circuit refused to extinguish the creditors' untimely claims. *Id.*

In *Reliable,* the Tenth Circuit held that even where a creditor knows of the underlying proceedings, the Debtors failure to schedule the creditor and notify them of the specific dates substantially impairs the creditors due process rights and violates the fifth amendment to the United States Constitution. *Id.* The Tenth Circuit has realized that the fundamental issue is the opportunity to be heard when a property interest is at stake and the bankruptcy bar-dates presuppose that all creditors and interested parties will be properly notified of all vital steps in the proceedings so they may have the opportunity to protect their interests. *Id.* Relying upon *New York,* the Tenth Circuit has held that a known creditor has a "right to assume" that he will receive all of the notices required by status before his claim is forever barred. *Id.*

The United States Court of Appeals for the First Circuit in *In Re Intaco, Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir., 1974) also relied upon the United States Supreme Court in New York in finding that the result that the failure of a debtor to provide actual notice required by the bankruptcy code to a known creditor precludes a finding that a creditor's claim is barred by confirmation.

The First Circuit's reasoning in *In Re Intaco* is particularly applicable here.

> "Moreover, the fact that the creditor may, as here, be generally aware of the pending reorganization, does not of itself impose upon him an affirmative burden to intervene in that matter and present his claim. The trustee can not avoid his statutory responsibility under Chapter X, to formally provide the required notice, simply because of a creditor's possible familiarity with general aspects of the proceedings." *Id at 99.*

A similar result was reached by the United States Court of Appeals for the Third Circuit in *In Re Harbor Tank Storage Co.*, 385 F.2d 111 (Third Circuit, *1967).* There, the Third Circuit also followed the holding of the United States Supreme Court in New York holding that a creditor has every right to assume that he will be sent all the notices to which he is entitled. *Id. at Page 115*

IV. CONCLUSION

As the Appellants were known creditors but were not afforded actual statutory notice, Appellants were improperly denied the right to file their claim. Although they had constructive notice and were generally aware of the

underlying bankruptcy proceedings, they did not receive notice sufficient to apprise them of the vital steps of the bankruptcy process. The Panel's decision that Appellants' "constructive notice" of the Debtor's bankruptcy proceedings was "adequate" and that the notice afforded satisfied due process was incorrect. This Court should not reward the Debtor for its failure to properly provide actual statutory notice to Appellants as known creditors by foreclosing Appellants' right to file a claim. Instead, the Court should follow the decision and reasoning of the United States Supreme Court and that of the other United States Court of Appeals on this issue.

Respectfully submitted,

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May 12, 1999

CERTIFICATE OF SERVICE

This is to certify that on the 12th day of May, 1999, a correct and true copy of the Appellants' *Petition for Rehearing En Banc* was served on all counsel of record via U.S. Mail at the following addresses:

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May 12, 1999

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No. 99-20

In the Supreme Court of the United States

GLORIA ROBINSON, PLAN ADMINISTRATOR OF THE LANDMARK INSURANCE GROUP PLAN, ETC., PETITIONERS

v.

CLOCK TOWER PLACE INVESTMENTS, LIMITED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioners' administrative claim on timeliness grounds.

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In the Supreme Court of the United States

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v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unpublished, but the decision is noted at 175 F.3d 1013 (Table). The district court's order (Pet. App. 9-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. The petition for a writ of certiorari was filed on June 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Landmark companies developed, owned, and managed a large portfolio of residential golf and resort communities. Clock Tower Place Investments (Clock Tower) was a holding company for the Landmark companies, and Oak Tree Savings Bank was the sole owner of Clock Tower. In October 1991, Clock Tower and its subsidiaries (Debtors) petitioned for Chapter 11 bankruptcy relief. The Office of Thrift Supervision immediately placed Oak Tree in receivership and appointed the Resolution Trust Corporation (RTC) as its receiver. The RTC was statutorily dissolved in 1995, and the Federal Deposit Insurance Corporation (FDIC) became receiver of Oak Tree. See 12 U.S.C. 1441a(m)(1); Pet. App. 4-5.

Petitioner Robinson is the former plan administrator of the Landmark Group Health Insurance Program (Plan). Landmark Land Co., Inc. (Landmark), which is not among the debtors in the bankruptcy proceedings below, established the Plan in the 1980s to pay the health benefits of the Landmark companies. Health benefits under the Plan were paid out of the employers' assets. In October 1991, immediately after the Debtors had filed their bankruptcy petitions, Landmark created a voluntary employees' beneficiary association trust (Trust) in accordance with 26 U.S.C. 501(c)(9) in order to ensure adequate funding for the Plan. Petitioners Carney and Welch served as trustees. The Debtors participated in this Trust, contributing funds to pay the benefits of the participants. The Trust was not established for any investment purpose, but was merely a conduit or "pay-as-you-go" trust to fund health benefit payments as claims were received. See Pet. App. 4-5, 10; FDIC C.A. Br. 7.

Beginning in 1989, Landmark's Benefits Committee decided to pay health benefits to certain allegedly ineligible individuals—primarily golf professionals working under contract for the Landmark companies. Both Robinson and Welch knew of the decision to make those payments; Robinson learned of them in 1989. Before the Trust was created, payments to the allegedly ineligible golf professionals exceeded $700,000, and, shortly after the Trust's inception and the bankruptcy filing, an additional $286,000 was disbursed. Petitioners' claim is that these payments violated the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* (Petitioners are not bringing a claim on behalf of themselves for their own health expenses.) Although Landmark, the initial Plan sponsor, made the payments, petitioners assert that the RTC and the FDIC somehow assumed liability. See FDIC C.A. Br. 7-8, 17-18.

2. In April 1996, several years after the applicable bar dates imposed by the district court, petitioners moved to file a proof of claim in bankruptcy and an administrative claim. Pet. App. 5-6. The district court denied the motion on alternate grounds. First, the court determined that petitioners had not set forth an "administrative claim" under Section 503(b) of the Bankruptcy Code, 11 U.S.C. 503(b), which provides that only "actual and necessary" costs and expenses of the estate may be allowed as administrative expenses. Pet. App. 12. Second, the district court found that the claims were in any event time-barred because petitioners had not established "excusable neglect" under Federal Rule of Bankruptcy Procedure 9006(b)(1) for filing the claims late. Pet. App. 13. Indeed, the court added, petitioners had not even acted in good faith, because, when they eventually did file a claim, they

initiated an adversary proceeding instead of moving to file a proof of claim. See *id.* at 14.

In an unpublished per curiam order, the court of appeals affirmed. Without addressing the district court's primary holding that petitioners had not even filed a valid "administrative claim," the court upheld the district court's alternative holding that petitioners' claims were time-barred. See Pet. App. 6-8.

ARGUMENT

Petitioners contend that the court of appeals "erred in failing to consider the legal significance of the fact" that petitioners did not receive "actual notice" of the bankruptcy proceedings. Pet. i (questions presented). That contention warrants no further review. As an initial matter, this Court generally does not grant certiorari to address an issue that the courts below "fail[ed] to consider," for a court's failure to consider an issue, particularly in an unpublished order, creates no precedent and has no significance beyond the particular case. At bottom, the petition amounts to a simple request for error correction, which is ordinarily an inappropriate basis for seeking certiorari.

Moreover, there is no error to correct. Petitioners do not deny that they had constructive notice of the bankruptcy proceedings and that constructive notice is sufficient for "those with mere conjectural claims." *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 490 (1988). Petitioners' argument rests instead on the factual premise that the Debtors in fact "knew of petitioners' claims" on the date of the bankruptcy filing. Pet. 8. That premise is false: As the district court appears to have recognized, there is no reasonable sense in which the Debtors could be said to have "known" of those claims. See Pet. App. 13. Petitioners

argue (Pet. 6) that such knowledge can somehow be inferred from the mere reference in certain bankruptcy schedules to the ongoing expected liability for funding routine health insurance claims under the Plan. But that argument is unsound. Petitioners, who are no longer administrators or trustees of the Plan or Trust (Pet. App. 10), do not seek payment for their medical expenses, nor does their claim have anything clearly to do with unpaid medical expenses. Instead, petitioners challenge, on obscure legal grounds (see Pet. App. 5, 12), payments the Plan had already made to the golf professionals. Petitioners cite no evidence to rebut the lower courts' implicit conclusion that the Debtors did not in fact "know" that such a claim would be brought.

As this Court has stated, not "everyone who may conceivably have a claim [is] properly considered a creditor entitled to actual notice. * * * [I]t is reasonable to dispense with actual notice to those with mere conjectural claims." *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490 (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Despite petitioners' factbound suggestion to the contrary, their underlying claim below was sufficiently "conjectural" that actual notice was unnecessary, and that fact alone distinguishes this case from those upon which they now rely. See Pet. 8-13 (citing, *inter alia*, *New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953), and several court of appeals cases).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Deposit Insurance Corporation

AUGUST 1999

No. 99-20

Supreme Court, U.S.
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In The

Supreme Court of the United States

GLORIA ROBINSON, as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement for the Landmark Group and as a participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, *et al.*,

Petitioners,

v.

CLOCK TOWER PLACE INVESTMENTS, LIMITED, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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Propriety of certiorari as a procedural matter

Although respondent, Federal Deposit Insurance Corporation, asserts that due process was satisfied, it does not, because it cannot, point to any finding of the district court or the Court of Appeals that petitioners were unknown claimants or that their claims were "conjectural". There are no such findings in the record. On the other hand, the fact that petitioners' claims were known, and that on the date bankruptcy proceedings were commenced, their claims were more than merely conjectural is supported by strong evidence in the record below. Pet.App. 22-31.

Respondent suggests that the inclusion of petitioners in the creditor listing is not sufficient to establish that they were known creditors, but respondent does not attempt to suggest why they would have been listed on the same basis as all other creditors, if their claims were uncertain or speculative. Nor does respondent explain why pre-petition "claims" stemming from health care plan obligations were being addressed by the court as early as two weeks after the bankruptcy was filed.

As the district court recognized in the record below, Robinson was aware of the payments made to ineligible health care recipients. Respondent argues that Robinson's awareness constitutes constructive knowledge to be imparted to all the petitioners, and satisfies due process. By respondent's reasoning, Robinson's knowledge of these payments, as an employee of the plan administrator, establishes that the debtors, as her employers, were aware of the claims.

This record notwithstanding, respondent maintains that petitioners' challenge boils down to the argument that the lower courts "erred in failing to consider the legal significance of the fact . . . " Respondent thereby implies that petitioners are merely arguing that the lower courts failed to consider and/or resolve certain disputed facts. Not so. It is petitioners' position that the district court and the Court of Appeals applied the wrong law to the undisputed facts. Had the lower courts considered the legal significance of the facts, they would correctly have determined that petitioners were entitled to actual notice, and because of the failure to provide them actual notice, are now entitled to file their claims.

Because petitioners were known creditors having known claims, the holding of the courts below that constructive notice satisfied due process was wrong and fundamentally unfair. In *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), it was said that "a principal purpose" for the exercise of certiorari jurisdiction is to resolve conflicts among the courts concerning "the meaning of provisions of federal law", which would most certainly include the requisites of due process. This matter is accordingly appropriate for a grant of certiorari.

Propriety of certiorari as a substantive matter

Respondent restates the "question presented" as: "Whether the district court erred in denying petitioners' administrative claim on timeliness grounds". In the lower courts, petitioners raised many issues besides the denial of their request to file an administrative claim out of time. Nevertheless, petitioners reply to the central argument

made by respondent – to wit, petitioners were not entitled to actual notice of the bankruptcy proceedings because their "administrative claims" were "conjectural".

This Honorable Court did not define "conjectural" in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), ("beneficiaries whose interests are either conjectural or future") nor did it define the term in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("it is reasonable to dispense with actual notice to those with mere 'conjectural' claims").

Turning to prosaic sources, the garden variety definition of "conjecture" is "inference based on incomplete or inconclusive evidence" (*Webster's II*), and *Black's* offers the following:

> A slight degree of credence, arising from evidence too weak or too remote to cause belief. Supposition or surmise. The idea of a fact, suggested by another fact; as a possible cause, concomitant, or result. An idea or notion founded on a probability without any demonstration of its truth; an idea or surmise inducing a slight degree of belief founded upon some possible, or perhaps probable fact of which there is no positive evidence . . . In popular use, synonymous with 'guess'.

Debtors knew when bankruptcy proceedings were instituted, and well before, that the payroll deductions made for the purported purpose of funding the health care plan had been commingled with other assets of the debtors. Debtors knew that the payroll deductions ought not have been commingled with their own assets, but

rather, in order to comply with the mandate of ERISA, paid into trust.

Debtors knew that the commingled funds, which included the funds subject to trust, were used to pay improper claims. Debtors knew those payments were being made to persons who were not eligible to participate in the health care plan.

Debtors thus knew when bankruptcy proceedings were instituted, and well before, that there was money owed to the fund and the participants to reimburse the payments to ineligibles. Debtors knew that the residue of the assets of the trust were the property of its beneficiaries (the prior plan participants). They knew those assets had been diminished by the improper payments.

Petitioners were participants in the plan and are beneficiaries of the trust who were known to debtors and who were known to have claims that were not and are not merely conjectural.

Participants' claim to the reimbursement of the wrongfully diverted plan funds and to the residue of the trust assets is not the creature of inference, supposition or surmise. It is more than possible, it is more than probable; it is actual, and is supported by strong evidence. It is not merely conjectural.

Conclusion and prayer for relief

Debtors knew of petitioners' claims, petitioners' claims were not and are not merely conjectural, the Court of Appeals erred in holding that constructive notice satisfied due process, and this issue is an appropriate basis for

certiorari relief. Petitioners respectfully request that this Honorable Court direct the Court of Appeals to remand this matter to the district court with instructions to permit petitioners to file their claims on behalf of the Plan and the Trust.

Respectfully submitted,

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